SUPREME COURT, U.S.
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No. 94-178

In the
SUPREME COURT OF THE UNITED STATES
October Term 1994

NEAL W. THOMPSON, and
PRECISION PROCESSING, INC.

Petitioners,

v.

KENTUCKY FRIED CHICKEN
CORPORATION, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 15 of the Rules of the Supreme Court of the United States, states in part:

> In addition to other arguments for denying the petition, the brief in opposition should address any

> perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements **in the brief in opposition**, and not later.... (emphasis in original and underlining supplied).

B. UNDISPUTED FACTS AND ISSUES - RULE 15

Having been "admonished" of their "obligation" to this Court, Counsel for KFC has not "pointed out" any "misstatements of fact or law" with regard to, but not by way of limitation, the following facts or issues and it is therefore undisputed that:

1. The facts set forth at Thompson's "Statement of Case" are accurate. (See Petition at pages 3-11.)

2. Patterson v. McLean, 491 U.S. 164, 109 S.Ct. 2363, 2377, 105 L.Ed. 136 (1989) does not hold that an "unenforceable" contract to test equipment acts as an absolute bar to a civil rights cause of action arising out of a refusal to enter into a "new and distinct" contract to buy equipment. (See "Questions Presented" Number 5 at Petition page IV, and Petition at pages 17 through 25.)

3. The Courts below erred in finding that it is legally or evenly logically possible for the same contract to be at the same time "unenforceable" so as to deprive Thompson of his contractual rights and to be at the same "enforceable"

so as to deprive Thompson of his civil rights. (See "Questions Presented" Number 4 at Petition page III, Petition at pages 17 through 25.)

4. No event or events relative to KFC's 1967-1968 theft of trade secrets took place in Kentucky, therefore it was and is improper to apply Kentucky's tort statute of limitations under either the substantive law of Kentucky or under the conflicts of laws of Pennsylvania (see "Questions Presented" Numbers 1 and 2 at Petition i and ii; and Petition at pages 4, 5, 6, 12, 13, 14, 15, 16, 17 and 26.)

5. "Counsel" for KFC violated its duty of candor to the Courts below by affirmatively averring to the Courts below that if KFC misappropriated

Thompson's trade secrets, that theft occurred in a place where no event occurred, or where no event could have occurred. (See "Questions Presented" Numbers 1 and 2, at Petition pages i and ii; and Petition at pages 4, 5, 6, 12 - 17 and 26.)

6. The Sixth Circuit erred in finding that all of Thompson's causes of action "stemmed from" the 1967-1968 theft of trade secrets. Not only did the District Court find to the contrary, but neither KFC nor Thompson ever argued that all of Thompson's causes of action "stemmed from" KFC's 1967-1968 theft of trade secrets (see KFC Brief in Opposition at pages 3 and 4; and Petition at "Questions Presented" Number 3, at Petition iii, and Petition at pages 16, 17, 26 and 27.)

7. In 1984 Dr. Rao, the head of KFC's Research and Development Department, prepared at the same time and for the same purposes two "Management Summaries" wherein he summarized the one set of tests conducted entirely by KFC. For reasons that neither Dr. Rao, nor KFC, nor KFC's "Counsel" can explain, Dr. Rao concluded in the version of "Management Summary" given to the Chief Executive Officer of KFC that Thompson's equipment did cook "at parity" and therefore did pass KFC's tests; and in the version of the "Management Summary" given to Mr. Thompson, Dr. Rao concluded from the same set of tests that Thompson's equipment did not cook "at parity" and therefore did not pass KFC's tests (see Petition at pages 8-11).

8. That in the early 1980s, when KFC had admitted to a poor history of hiring and contracting with minorities, KFC refused to buy, or use, or approve equipment manufactured by a black man even though KFC's own tests proved that Mr. Thompson's equipment not only cooked "the perfect Kentucky fried chicken", but did so not only "at parity" with other equipment used or approved by KFC, but also did so at a savings, documented entirely by KFC, in excess of $1 million a year (see Petition at pages 7-11).

C. AFFIRMATIVE MISREPRESENTATIONS OF FACT AND LAW BY KFC

KFC devotes most of its 15 page Brief to a recital of the procedural history of this case which is not disputed or particularly relevant. KFC then seems to

argue that Thompson's Petition, as well as apparently all other petitions, should be denied based solely upon the showing of a long docket sheet which apparently irrefutably establishes that there is no need for this Court to review the findings of any of the courts below.

KFC, then, at page 13 sites United States vs. Johnston, 268 U.S. 220, 227 (1925) apparently for the proposition that this Court cannot review the evidence or the facts in order to determine whether the Courts below, at the Summary Judgment level, properly applied those facts and that evidence to the Federal Rules of Civil Procedure (i.e. Rule 56), to the United States Code (i.e. 42 U.S.C.§1981, 1985, and 1986), or to the prior decisions of this Court (i.e. Patterson vs. McLean, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 136 [1989]).

The purpose of the above arguments was apparently to fill up 10 or 12 pages of KFC's Brief which would have otherwise had to be left blank.

Thompson's only other response to the bulk of KFC's Brief is to simply refer this Court to its own review of summary judgment decisions in Celotex Corp. vs. Catrell, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) as also cited by KFC at page 10 of its Brief here, as well as Matsushita vs. Zenith, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

At page 3 of its Brief KFC states that:

> "After discovery confirmed that respondent did not misappropriate petitioners' trade secret claim (sic), respondent filed a motion for summary judgment." (parenthesis and underlining supplied)

The opening phrase of the above quote is a misrepresentation of the record by KFC's "Counsel".

No Court has found that KFC did not misappropriate Thompson's trade secrets.

To the contrary, the District Court at the Summary Judgment level, stated that the issue of misappropriation of Thompson's trade secrets by KFC was "hotly disputed" (see Appendix at A-4).

This Court's attention is also directed to footnote 2 at page 11 wherein KFC affirmatively avers that KFC also "proved" by "alternative grounds" that Thompson's misappropriation claim "must fail". At footnote 2 KFC paraphrases the middle of a paragraph from the District Court's Opinion, but KFC deletes the conclusion of the District Court which is that the District Court did not "address" KFC's "alternative grounds" of proof.

At page 6 of its Brief, KFC states that there is no conflict between the Sixth Circuit and this Court.

Said statement is incorrect.

The Sixth Circuit has held that Thompson cannot bring a civil rights cause of action arising out of a refusal to enter into a contract when no prior "enforceable" contract exists and/or that an "unenforceable" contract is an absolute bar to a civil rights cause of action arising out of a refusal to enter into a contract and/or an "unenforceable", but yet "enforceable" contract is an absolute bar to a cause of action arising out of the refusal to enter into a "new and distinct" contract.

Clearly the Sixth Circuit is in conflict with the decision of this Court at Patterson, supra, Part IV at 2377 et seq.

This Court has simply held in Patterson, at Part IV at 2277 et seq. that a cause of action for a refusal to enter into a "new and distinct" contract remains viable even though the cause of action arose out of or during the existence of an "enforceable" contract.

Further and contrary to the affirmative misrepresentation by KFC, Thompson does not allege that KFC refused to enter into a contract to retest his equipment, or that KFC refused to renew the contract to test. The contract which KFC refused to enter into is the "new and distinct" contract under which KFC would purchase Thompson's equipment after the contract to test had been completed. (see KFC footnote #4 at page 14)

At footnote No. 1 at page 10 of KFC's Brief, KFC again, as it did to the Courts

below, misrepresents the basis of another of Thompson's causes of action.

Thompson does not allege that KFC falsified the results of any of the individual test conducted by KFC. Thompson alleges that KFC's Dr. Rao fraudulently summarized and evaluated the individual tests when he prepared and "kept two sets of books" - one set used internally which stated that KFC's individual tests proved that Thompson's equipment did cook "at parity" and therefore did pass KFC's tests, and another version which was given to Thompson which states that the same tests proved that Thompson's equipment did not cook "at parity" and did not pass KFC's test (see Petition at pages 8, 9, 10 and 11, and pages 1, 2 and 6 supra).

Not only have the Courts below, at the Summary Judgment level, exceeded their

authority by resolving a factual dispute (i.e. choosing which set of KFC's books to believe), but the Courts below improperly resolved that factual dispute in favor of the moving party (KFC) as opposed to the non-moving party (Thompson). Further, even though it is not disputed that KFC "kept two sets of books", the Courts below ignored reality and found that Thompson had "no evidence (of a fraud, or of a breach of contract, or of a racial bias) other than unsupported accusations" (see Petition at Appendix A-19 and KFC's Brief in opposition at page 10).

At page 12 of KFC's Brief, KFC argues that the Joint Development Agreement was and is "unenforceable", but at pages 13 and 14 and at footnotes 3 and 4 of KFC's Brief, KFC argues that Thompson's civil rights cause of action is barred because said cause of action arose out of "the

performance (of KFC's) contractual obligation" under the Joint Development Agreement which at the page before was an "unenforceable" contract and was therefore a document which by definition could not legally or logically give rise to any enforceable "contractual obligations." (Also, see pages 11 and 12 supra.)

D. CONCLUSION

Notwithstanding the undisputed fact that the Complaint alleges otherwise, notwithstanding the undisputed fact that both Thompson and KFC argued to the contrary and notwithstanding the undisputed fact that the District Court agreed with Thompson and KFC, the Sixth Circuit, without any factual or legal basis and without the support of any party to this action, concluded that Thompson's 1982/1984 breach of contract, racial

discrimination and fraud causes of action all "stemmed from" KFC's 1967/1968 theft of trades secrets.

Said conclusion is sheer folly.

KFC misappropriated Thompson's trade secrets 15 years before Dr. Rao's fraud and 15 years before the Joint Development Agreement was written.

Further, and contrary to the law, as well as to the laws of nature and physics, the Sixth Circuit and the District Court, as alleged by KFC, held that the 1967/1968 theft of Mr. Thompson's trade secrets occurred in a place where nothing could have occurred and in a place where nothing in fact did occur.

Further the Courts below and KFC held and argued that the Joint Development Agreement is "enforceable" for purposes of depriving Mr. Thompson of his civil rights and that <u>at the same time the same agree-</u>

ment is "unenforceable" for the purposes of depriving Mr. Thompson of his contractual rights.

Next, the Courts below inexplicably described Dr. Rao's fraudulent keeping of two sets of books as "no evidence (of fraud, breach of contract or racial bias) other than unsupported accusations".

In view of the above the undersigned is reminded of the dream or (nightmare) of Abram Jasper, a black politician of the late 1800s. Mr. Jasper dreamt that he had died and that St. Peter had denied him access to heaven because Mr. Jasper had walked to heaven as opposed to riding well "mounted" to heaven as was required. On his way away from heaven Mr. Jasper met Mr. Horace Greeley, a prominent newspaper editor and a presidential candidate of that time. Mr. Greeley, a white man, was also walking to heaven. After Mr. Jasper

disclosed the secret of getting into heaven to Mr. Greeley, Mr. Greeley informed Mr. Jasper that if Mr. Jasper acted as Mr. Greeley's "mount", they would both jointly be able to ride into heaven. When Mr. Greeley, riding his "mount", reached heaven; St. Peter, of course, told Mr. Greeley that he certainly could enter into heaven, but that before doing so Mr. Greeley would have to tie-up his "mount" outside. Mr. Greeley did so and entered heaven; Mr. Jasper was left "tied-up" and "outside". [Melville D. Landon, King of the Platform and Pulpit (Chicago: Werner Company, 1895) pp. 558-59.]

As irony would have it, Mr. Jasper spoke of his dream during a speech given in Louisville, Kentucky.

Here, and, at least in part, because of the affirmative misrepresentations of fact and law made to the Courts below by

Counsel for KFC, the Courts below have made decisions which are diametrically opposed, which violate logic, the law and the laws of nature and physics, and which also violate this Court's holding in Patterson at part IV.

As a result, a man who is black now stands tethered "outside" the protection of reason and the law.

Surely, it must be clear that:

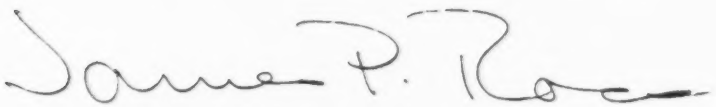
1. The Courts below have decided an important question of federal law in conflict with this Court's decision in Patterson [see Rule 10.1(c) of the Rules of the Supreme Court of the United States];
2. The Courts below and KFC and KFC's counsel have "...so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of

supervision...." [see Rule 10.1(a)], and

3. The Briefs here show "special and important reasons" for this Court to grant Certiorari.

Dated: September 22, 1994.

Respectfully submitted.



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